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Date: July 8, 2015

To: Chairwoman Dimitrijevic
County Board Supervisors

cc: Kelly Bablitch
Elizabeth Stephens
Steven Cady
Scott Manske
Interested Parties

From: Paul Bargren *PB*
Corporation Counsel

Re: Senate Bill 21 (Senate Substitute Amendment 1, as amended)

Madam Chair,

On behalf of the Board, you asked for my legal analysis of proposed statutory changes affecting the powers of the County Board and the County Executive. You also asked for my thoughts on any constitutional conflicts.

I. Summary

Acquisition, sale and control of all county property except County Parks would be handled administratively through the Executive.

For example, no County Board approval or consideration would be required if the Executive opted to sell Park East or other non-park County property, although either the Comptroller or a municipal representative would need to agree with the Executive's action.

This provision would take effect upon enactment of the state budget, which apparently will be later this week.

I do not believe this raises constitutional issues under the Wisconsin or federal constitutions.

This memo describes the version of the state budget approved by the Senate on July 7 and sent to the Assembly for consideration today. This version is Senate Substitute Amendment 1 (SSA1) to Senate Bill 21, as amended, including by Senate Amendment 2 (SA2) to SSA1.¹

¹ SSA1 was approved by the legislature's Joint Finance Committee on a party-line vote of 12-4 on July 2. It was amended, including with SA2 (adopted 17-16), and adopted by the Senate (19-14) on July 7. Changes affecting the County Board and Executive were described in Paragraph 67 of Motion 999, a catchall amendment that was adopted

This memo is public, and you are free to share it as you wish.

II. Property and land sales and acquisition

With the exception of County Parks, SSA1 would delegate to the Executive all of the powers that a County Board normally exercises under § 59.52(6), Stats., concerning county real estate and personal property. This would complete a transition that began with Act 14 two years ago.

Specifically, the executive could lease, sell or convey any non-park county property regardless of Board policy and without Board approval. SA1 § 1907m, § 59.17(2)(b)3, * Stats.² Proceeds of the sale would be applied first to any debt on the property. *Id.* Before the Executive's sale of County land could take effect, written approval that the sale is in the best interests of the county would be required either from a) the Comptroller or b) an individual from the municipality where the land is located who is appointed by the Executive Council of the Intergovernmental Cooperation Council³ and is experienced in real estate but is not an elected official. *Id.*

The new provision would also give the Executive sole authority to "[m]ake all orders concerning county property and commence and maintain actions to protect the interests of the county." § 59.52(6)(b), Stats., read in conjunction with § 59.17(2)(b)3. * In other words, the Executive would have the ability to initiate legal action to protect the interests of the county related to property.

The new provision gives the Executive the ability to "construct, purchase, acquire, lease, develop, improve, extend, equip, operate and maintain all county buildings, structures and facilities." § 59.52(6)(d)1, Stats., read in conjunction with § 59.17(2)(b)3. * However, that authority necessarily would be subject to funding available through the budget, bonding or otherwise.

III. Constitutional issues

The changes would not in my view present constitutional issues that could be challenged by the County.

First, enactments of the legislature are presumed valid and constitutional. The Supreme Court "indulges every presumption of constitutionality and will sustain the law if at all possible." *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985). "If there is any reasonable basis for the exercise of the legislative power, we are obliged to uphold the enactment." *Id.* A challenger must show that "the statute is unconstitutional beyond a reasonable doubt." *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328.

by Joint Finance, also 12-4. SSA1 incorporated Paragraph 67 into statutory amendments. The text of SSA1 is available at http://docs.legis.wisconsin.gov/2015/related/amendments/sb21/ssa1_sb21. The provisions of interest were in §§ 1907m – 1907r, 1912r, and 1914g, pp. 583-590. SA2 made further changes to SSA1 in sections 6 through 11 at pages 3 and 4. The text of SA2 is available at http://docs.legis.wisconsin.gov/2015/related/amendments/sb21/sa2_ssa1_sb21.

Had SA2 not passed, an additional set of changes would have placed contracting and procurement solely within the administration and the County Board would not have had any role in reviewing or approving contracts. Also, absent SA2, the Executive would have had authority to sell O'Donnell Park without Board approval.

² Citations in *italic* marked with a * are statutes proposed in the pending legislation.

³ The Executive Council is the mayor of Milwaukee and the top executive of the 18 villages in the County.

Second, “[as] an arm of the state, generally the county cannot question the constitutionality of a state statute.” *Columbia County v. Wisconsin Retirement Fund*, 17 Wis. 2d 310, 317, 116 N.W.2d 142, 146 (1962). A taxpayer who brings an action attempting to protect the same interests as the county also lacks standing, but rather must assert a direct and personal pecuniary interest in order to have standing. *Id.*, 17 Wis. 2d. at 318-19. Likewise, a “municipal corporation has no privileges or immunities under the federal constitution which it may invoke against state legislation affecting it.” *State ex. Rel. Prahlow v. City of Milwaukee*, 251 Wis. 521, 527-28, 30 N.W.2d 260, 263 (1947).

Third, as is well recognized, the “authority of the legislature over a municipal corporation is supreme, subject, however, to such limitations as may be prescribed by the state constitution.” *Prahlow, id.* “As a creature of the legislature, a county must exercise its powers within the scope of authority that the state confers upon it.” *County of Milwaukee v. Williams*, 2007 WI 69, ¶ 24, 301 Wis. 2d 134, 732 N.W.2d 770.

And fourth, the Wisconsin constitution provides the legislature with substantial power to make laws expanding or restricting the powers of the County Board. The key provision is Art. IV, § 22:

Powers of county boards. The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe

This section gives the legislature the power to delegate or remove powers from the County Board. Here, the legislature would remove powers over land sales. In effect, the legislature has inserted itself in place of the County Board and, as a matter of county policy, has delegated administration of land sales and contracts and procurement to the Executive.

The fact that this provision would be unique among the 72 counties is also permitted under the Wisconsin Constitution, which provides in Art. IV, § 23 that the legislature “shall establish one **or more** systems of county government.”⁴ Uniformity is not required.

The legislation does not implicate the Executive’s veto power (and thus does not invoke the County Board’s ability to override): since under the new provisions land sales are not subject to County Board action in the first place, there is nothing to veto. “One man, one vote” concerns do not apply. See *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 132 N.W.2d 249 (1965). That principle refers to each voter within the Milwaukee County having equal representation in the government, which is accomplished here through the fact that each voter is able to vote for County Executive.

⁴ This is in contrast to the system of town government, which must be “as nearly uniform as practicable” throughout the state. Art. IV, § 23.
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